FILE COPY

72-387

Supreme Court, U. S.
FILED
SEP 6 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-387

ROBERT SCHWARTZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARNOLD DAVIS
Counsel for Petitioner
40 Exchange Place
New York, New York 10005
(212) 344-3399

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement of the Case 8

The Government's case 10

The Defendant's case 14

The Government's rebuttal 15

The Trial Court's decision 16

REASONS FOR GRANTING THE WRIT

1. The decision below deprived petitioner of his constitutional right to a speedy trial by having condoned excessive and unexplained pre-accusation and post-indictment delay, all of which operated to petitioner's prejudice. This matter presents a novel situation in that it grants an opportunity for this Court to clarify its prior opinions and to establish rules and guidelines under a fact pattern never so precisely presented to this Court on the occasions of such prior opinions 17

Pre-accusation delay 18

Post-indictment delay 18

PAGE

2. A novel situation is presented to this Court in the presence of the trial court's decision below, that the grand jury indictment of petitioner was not supported by evidence "sufficient" by any standard. The Court is presented with the opportunity of clarifying its prior opinions in *Costello* v. *United States* (350 U.S. 359) and *Lawn* v. *United States* 355 U.S. 339) in which there was some form of evidence presented to support the indictment 23

3. The provisions of 15 U.S.C. §78h(c) have never been presented to this Court for a determination of its constitutionality. The statute is vague and devoid of sufficient safeguards to satisfy the requirements of the due process clause of the Fifth Amendment. Additionally, the construction adopted below may open the door to a species of regulation never intended to affect over-the-counter securities brokers 26

4. The provisions of 15 U.S.C. §78ff(a) have never been presented to this Court for a determination of its constitutionality. The statute is vague and misleading concerning the requirements of "intent" necessary to the definition of a violation thereunder. The decisions below inject confusion into the penalty statute governing violations of statutes, rules and regulations affecting matters within the jurisdiction of the Securities and Exchange Commission and affect significant and recurring problems in the securities field 29

PAGE

5. A fair trial was denied to petitioner by reason of multiple prejudicial errors below occasioned when the trial court (1) misapplied statutory rules of construction to the facts, (2) shifted the burden of proof in a criminal prosecution to the defendant and (3) admitted tainted evidence and incomplete business records which operated to create an hostile atmosphere toward petitioner, all in deprivation of his right to due process of law under the Fifth Amendment 32

CONCLUSION 36

APPENDIX—

Opinion of Second Circuit 1a
Judgment of Affirmance 24a
Special Findings and General Findings of District Court 26a
Memorandum and Order 44a
Judgment and Commitment 51a

TABLE OF AUTHORITIES

Cases:

Barker v. Wingo, 40 U.S.L.W. 4840 ..... 17, 20, 22

Christoffel v. United States, 338 U.S. 84 34
Connally v. General Constr. Co., 269 U.S. 385 28
Costello v. United States, 350 U.S. 359 ..... 23, 24, 25, 26

Davis v. United States, 160 U.S. 469 33
Dickey v. Florida, 398 U.S. 30 ..... 19, 22

PAGE

Ex Parte Bain, 121 U.S. 1 25

Hale v. Henkel, 201 U.S. 43 25

Jordan v. DeGeorge, 341 U.S. 223 28

Kraus & Bros. v. United States, 327 U.S. 614 28

Lawn v. United States, 355 U.S. 339 ..... 23, 25
Lanzetta v. New Jersey, 306 U.S. 451 28

Musser v. Utah, 333 U.S. 95 28

Nickens v. United States, 323 F.2d 808 20

Palmer v. Hoffman, 318 U.S. 109, ... 35
People v. Atwater, 229 N.Y. 303 ..... 13, 33

United States v. Arcuri, 405 F.2d 691 23
United States v. Cardiff ,344 U.S. 174 28
United States v. Couming, 445 F.2d 555 30
United States v. Farrington, 5 F. 343 24
United States v. Krosky, 418 F.2d 65 30
United States v. Lilley, 291 F. Supp. 909 31
United States v. Marion, 404 U.S. 307 ..... 17, 20, 22
United States v. Murdock, 290 U.S. 389 30
United States v. Wells, 163 F. 313 25

Statutes:

15 U.S.C. §78h(c) 4, 8, 13, 14, 16, 26, 27, 28, 29, 32

15 U.S.C. §78o 8, 28

15 U.S.C. §78ff(a) 4, 30

18 U.S.C. §371 5

28 U.S.C. §1732 ..... 12, 34

17 C.F.R. §240.8c-1 ..... 6, 32

17 C.F.R. §240.8c-1(b)(2)(i) 32

Amendment V—United States Constitution 3, 32

Amendment VI, United States Constitution 4

Other Authorities:

25 Federal Reserve Bulletin, 961 27

Green, The Rules Governing the Hypothecation of Customers' Securities and Manipulation of Security Prices, in the Over-the-Counter-Market, January 21, 1941, p. 7 33

In the

Supreme Court of the United States

October Term, 1972

No. .....

Robert Schwartz,

Petitioner,

v.

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Robert Schwartz, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 17, 1972.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court of the United States for the Eastern District of New York, and its Ruling on Motion for Judgment of Acquittal for a New Trial appears in the Appendix hereto. The opinion and ruling of the District Court were not reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 17, 1972. An order extending petitioner's time to file a petition for writ of certiorari to and including September 15, 1972 was made by Mr. Justice Thurgood Marshall on August 8, 1972, and this petition has been filed within the extended time period. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the petitioner's right to a speedy trial, under the Sixth Amendment of the United States Constitution, was denied to him below.

2. Whether the refusal, below, to dismiss the indictment against petitioner was a denial of his rights under the Fifth Amendment of the United States Constitution.

3. Whether the statute under which petitioner was prosecuted, 15 U.S.C. §78h(c) was so vague and indefinite as to be in violation of the due process clause of the Fifth Amendment of the United States Constitution.

4. Whether the provisions of 15 U.S.C. §78ff(a), which the courts below considered on the matter of intent sufficient to constitute conduct proscribed by the statute, was so vague and indefinite as to be in violation of the due process clause of the Fifth Amendment of the United States Constitution.

5. Whether petitioner's rights to a fair trial were denied to him during the course of the trial by a shifting of the burden of proof to him.

6. Whether petitioner's rights to a fair trial were denied to him by the admission of tainted records under the authority of the Federal Business Records Act, 28 U.S.C. §1732.

7. Whether petitioner's rights to a fair trial and to due process of law under the Fifth Amendment of the United States Constitution were denied to him by failure to prove beyond a reasonable doubt his guilt of the crime charged.

Statutory Provisions Involved

The following statutes are directly involved on this application and were considered by the courts below:

United States Constitution

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

"In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Title 15, United States Code

"§78h. Restrictions on borrowing by members, brokers, and dealers

It shall be unlawful for any member of a national securities exchange, or any broker or dealer who transacts a business in securities through the medium of any such member, directly or indirectly—

• • •

(c) In contravention of such rules and regulations as the Commission shall prescribe for the protection of investors to hypothecate or arrange for the hypothecation of any securities carried for the account of any customer under circumstances • • • (3) that will permit such securities to be hypothecated, or subjected to any lien or claim of the pledgee, for a sum in excess of the aggregate indebtedness of such customers in respect of such securities."

"§78ff. Penalties

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder

the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation."

Title 18, United States Code

"§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

HYPOTHECATION OF CUSTOMERS' SECURITIES

"§240.8c-1. Hypothecation of customers' securities.

(a) *General provisions.* No member of a national securities exchange, and no broker or dealer who transacts a business in securities through the medium of any such member shall, directly or indirectly, hypothecate or arrange for or permit the continued hypothecation of any securities carried for the account of any customer under circumstances:

(1) That will permit the commingling of securities carried for the account of any such customer with securities carried for the account of any other customer, without first obtaining the written consent of each such customer to such hypothecation;

(2) That will permit such securities to be commingled with securities carried for the account of any person other than a bona fide customer of such member, broker or dealer under a lien for a loan made to such member, broker or dealer; or

(3) That will permit securities carried for the account of customers to be hypothecated or subjected to any lien or liens or claim or claims of the pledges or pledgees, for a sum which exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts; except that this clause shall not be deemed to be violated by reason of an excess arising on any day through the reduction of the aggregate indebtedness of customers on such day, provided that funds or securities in an amount sufficient to eliminate such excess are paid or placed in transfer to pledgees for the purpose of reducing the sum of the liens or claims to which securities car-

ried for the account of customers are subjected as promptly as practicable after such reduction occurs, but before the lapse of one-half hour after the commencement of banking hours on the next banking day at the place where the largest principal amount of loans of such member, broker or dealer are payable and, in any event, before such member, broker or dealer on such day has obtained or increased any bank loan collateralized by securities carried for the account of customers.

(d) *Definitions.* For the purposes of this section:

(1) The term "customer" shall not be deemed to include any general or special partner or any director or officer of such member, broker, or dealer, or any participant, as such, in any joint group or syndicate account with such member, broker, or dealer or with any partner, officer or director thereof;

(2) The term "securities carried for the account of any customer" shall be deemed to mean:

(i) Securities received by or on behalf of such member, broker or dealer for the account of any customer;

(ii) Securities sold and appropriated by such member, broker or dealer to a customer, except that if such securities were subject to a lien when appropriated to a customer they shall not be deemed to be "securities carried for the account of any customer" pending their release from such lien as promptly as practicable:

(iii) Securities sold, but not appropriated, by such member, broker or dealer to a customer who has made any payment therefor, to the extent that such member, broker or dealer owns and has received delivery of

securities of like kind, except that if such securities were subject to a lien when such payment was made they shall not be deemed to be "securities carried for the account of any customer" pending their release from such lien as promptly as practicable:

Statement of the Case

On ~~October~~ November 14, 1966, an indictment[1] was filed charging that between October 10, 1961 and November 15, 1961, petitioner and others wilfully and knowingly conspired together to violate §§78h(c) and 78o(c)[2] of Title 15, U.S.C., by agreeing to cause Armstrong & Co., Inc., a broker and dealer registered with the Securities and Exchange Commission, "which transacted business in securities through the medium of members of a national securities exchange", to pledge and hypothecate 150,000 shares of the common stock of Triangle Instrument Co., Inc. to Sterling Factors Corp., which shares were carried for the account of customers of Armstrong & Co., Inc. under circumstances that permitted commingling of such customers' stock without their written consent and which permitted such shares to be subjected to a lien or claim of the pledgee for a sum in excess of the aggregate indebtedness owed by said customers in respect of said stock, in violation of the Rules

---

[1] The indictment contained 18 counts, the 18th count having been limited to petitioner and Robert Edens. That count was severed from the remainder of the indictment and the trial below concerned that count only. This petition is limited to such 18th count as though no other crime had been charged of petitioner.

[2] During the course of trial, on petitioner's motion, the government was precluded from claiming a violation of §78o(c) by reason of the indictment's failure to allege indispensible jurisdictional matter.

and Regulations promulgated by the Securities and Exchange Commission.

On February 13, 1968, petitioner moved for an order claiming, *inter alia,* the violation of his Constitutional rights in that the Grand Jury had insufficient evidence before it to warrant finding the indictment delivered against him and demanding that the government file a bill of particulars. So much of the motion as attacked the indictment was denied; however, a bill of particulars was ordered to be filed.

Almost two years passed before the directed bill of particulars was filed. Petitioner then made several motions including another motion to dismiss Count 18 on constitutional grounds. He complained that his right to a speedy trial was violated when the government waited for more than four and one-half years following an S.E.C. investigation and disclosure of the facts to hand up an indictment; that the government delayed in bringing the matter to trial within a reasonable time after indictment so that there was a passage of some eight and one-half years between the date of the alleged wrongdoing and the making of his motion; that the government delayed for a period of two years the filing of its bill of particulars; and that the compounded delay, without cause, eroded any rights which he had. That motion was denied. However, with respect to his claim that the indictment was insufficiently based, the District Judge wrote:

> "The precise language of Mr. Justice Black in *Costello* v. *United States,* 350 U.S. 359 at 363 makes the bare vote of the Grand Jury enough. *Here there was that and nothing more. There was no evidence 'sufficient' by any standard to support the charge.* Nevertheless, the motion must be denied. It is so ordered." [Emphasis supplied.]

At the opening of the trial, petitioner again moved for dismissal of the indictment and charged that his constitutional right to a speedy trial was violated.

The Government's case

Petitioner, a New York lawer, was legal advisor to Armstrong & Co., Inc., an over-the-counter brokerage house which transacted *less* than 1% of its business through members of national securities exchanges. He specialized in securities matters and had a reputation of prominence in the field.

In September, 1961, Armstrong was named underwriter in an "all-or-nothing",[3] Regulation A offering of 150,000 shares of stock of Triangle Investment Co., Inc. It established an escrow account at a local bank and proceeded to take subscriptions (and deposits) from individuals and from other broker-dealers.

The Triangle deal was to close within a period of 45 days from September 15, 1961. In anticipation of the closing, Armstrong sent the escrow bank (as Transfer Agent) a list of subscribers together with instructions for registration of the shares to be issued.[4] Although it reported having sold the entire issue and it had so indicated on its

---

[3] An "all-or-nothing" offering was explained as one imposing a burden upon the underwriter to sell the entire issue pursuant to the offering circular, otherwise, the deal would fail and the broker would be under an obligation to refund all subscribers' deposits received by it. There would be no breach on the part of a broker by reason of the failure of such a deal, however. Under the Regulations, a broker could not subscribe for its own account in order to supply any sales deficiency for purposes of protecting the deal.

[4] The record indicates that the stock certificates had not yet issued when the letters of instruction were delivered by Armstrong to the Transfer Agent and that the shares would not issue until Triangle was paid $230,000.00.

offering circular, Armstrong's cash position indicated that it had insufficient funds to complete the transaction.[5] A proposal was made that Armstrong borrow the deficient funds on the *unissued* Triangle shares. Edens, Armstrong's president, conferred with the attorneys for the Transfer Agent and with petitioner, and at the bank's instruction a new letter of instruction was sent to it. The prior letter of instructions was rescinded and the bank was instructed to issue all the Triangle shares in Armstrong's street name. Edens recalled petitioner having told him that he had checked the propriety of the loan transaction with the S.E.C.

Prior to the actual closing date, Edens executed some 1,500 stock transfer powers, on behalf of Armstrong, at the bank. These powers were delivered to Sterling one day prior to closing. The Court found that the powers and the stock had been delivered directly to Sterling against its delivery to Triangle of its certified check.[6]

Armstrong's loan transaction with Sterling provided for periodic repayment with Armstrong having the right to take down shares to the extent of payments made. It ultimately transpired that Armstrong defaulted on the loan agreement. The record indicates, however, that all subscribers eventually received their Triangle shares.

---

[5] The Trial Court remarked in its Findings:

"• • • The impression was produced that all of the stock had been sold, and the offering circulars were so stamped. The evidence does not establish beyond a reasonable doubt that Schwartz was conscious that some of the new issue stock had not yet been sold • • •."

[6] Upon finding an unsigned stock receipt prepared for Armstrong's signature at the closing, the Trial Court remarked (p. 215):

"• • • If he had received the one hundred and whatever-it-is thousand shares from Meadowbrook he would have delivered the receipt to them. The fact that he apparently still has the receipt shows that he never got the shares."

During the course of the trial, the government endeavored to offer in evidence Armstrong's blotters,[7] to demonstrate that Armstrong was insolvent during the course of the Triangle transaction and that Schwartz was connected to its financial ills. Over objection, the evidence was received, although the testimony indicated that the blotters had been false, rewritten, altered and obliterated. In such poor state, petitioner argued that the blotters could not be received in evidence as books reflecting the regular course of Armstrong's business, under 28 U.S.C., §1732.[8]

At the conclusion of the government's case, petitioner moved for dismissal on grounds that there was a failure to prove that Armstrong came within the purview of

---

[7] The blotter was identified as the "Bible" of a brokerage house. It was the book of original entry showing everything that happened in the brokerage house, such as the purchases of securities, the sales of securities, the disbursements of money, the receipts of money, the receipts of stock and the delivery of stock.

[8] Edens admitted that he had called in several accountants to bring Armstrong's books up to date. This they could not do by reason of the superabundance of missing blotter entries.

Fier, Armstrong's cashier, testified that she would make blotter entries from slips given to her by Edens and that if Edens did not desire an entry to be made a corresponding slip would not be released to her by him. She had no knowledge concerning falsity of entries and denied that she would consciously make a false entry.

The S.E.C. investigation report, received in evidence, indicated that the books contained numerous mis-postings, omissions and incorrect entries and that they were in a deplorable condition.

Petitioner urged that the records were so tainted, that, outside of their being evidence of the type of records kept by Armstrong, such records could not constitute evidence of the manner of business conducted by it.

The Findings of the Trial Court indicate that it relied upon the tainted blotters to support its conclusions concerning sales of Triangle shares by Armstrong and concerning Armstrong's insolvency during the offering period.

§78h(c)[9] or that there had been an hypothecation of customers' securities.[10] He voiced disagreement with the Trial Court's prior decision based on the *Costello* case and argued that a prima facie case of guilt, beyond a reasonable doubt, was not made out against him. He claimed that the government failed to show that he had reason to believe that his charged act was unlawful.[11] He claimed that there was a complete absence of evidence to show that he wilfully and knowingly conspired to violate §78h(c).[12] The

---

[9] It was demonstrated that Armstrong transacted less than one percent of its business through the medium of members of national securities exchanges. As such, petitioner, claimed that Armstrong was not a broker-dealer who "transacts a business in securities" through the medium of members of national exchanges. The Trial Court concluded that for purposes of jurisdiction, it was sufficient if any of the broker-dealer's business was transacted through a member of a national exchange.

[10] Petitioner argued that there was no hypothecation within the purview of the statute since Armstrong had never received the stock in the first instance. Armstrong's *right to receive the stock* was hypothecated prior to its issuance and prior to its having been "carried for the account of [its] customers" as charged in Count 18. The Trial Court found that Armstrong had possession of the stock, "however fleetingly", prior to the hypothecation thereof, citing *People* v. *Atwater*, 229 N.Y. 303 (1920).

[11] During the course of the argument at the end of the government's case, the Trial Court remarked (at p. 1003):

> "I think the general evidence is that Mr. Schwartz is not aware that there was anything false in the papers which backed up the November 16th closing * * *."

It ruled that the government had failed to prove beyond a reasonable doubt "corruption" on petitioner's part and remarked that petitioner, although conscious of the transaction, acted in an "entirely honest spirit". The Court continued (at p. 1030):

> "* * * The evidence supports an inference that does not compel that there was conscious consummation of a transgression which in fact violated a rule of known applicability that appears to spell out a foundation for a finding of guilt of a malum prohibitum * * *.

[12] The Trial Court concluded that for purposes of the conviction at bar, it was immaterial to determine whether or not petitioner intended to violate the statute.

Trial Court denied the petitioner's motions and ruled:

> "The defendant does not have to prove an affirmative defense by any measurable standard of testimony, but in these circumstances, it appears to me that the defendant must present evidence which, taken with all other evidence in the case, would put the trier of the facts in a position to determine whether or not the government has shown beyond a reasonable doubt the presence of such wilful and knowing conduct as to contemplate a finding of violation."

The Defendant's case

Petitioner recalled that the matter of short term financing as a solution to Armstrong's problem was first suggested by the bank; however, *he could no longer recall the name of the person with whom he had spoken.* He revealed that he had discussed the legality of the transaction in an informal manner with a Col. Parlin, the legal expert of the Interpretation Division of the local S.E.C. office, revealing the proposal, and receiving the informal opinion that the transaction was allowable.

He testified that he believed that he was not in any manner involved in charges growing out of the S.E.C. investigation of Armstrong's transactions[13] and that in the interim, between the close of the investigation and the handing up of the indictment, he had destroyed 50 to 60 of his Armstrong files, among which the Triangle transaction was reflected and which also contained notes of his

---

[13] Petitioner explained that he had represented Armstrong and individuals at the S.E.C. investigation proceedings and that he had received a prior agency clearance before he was permitted to enter upon such representation. The investigation report of the S.E.C., admitted in evidence, failed to name petitioner as a proposed defendant nor did it tender §78h(c) as a statute under which criminal prosecution should be pursued.

conversation with Col. Parlin. As a result of that investigation, Armstrong's authority to act as a broker-dealer was revoked.

The Government's rebuttal

Feiner, an S.E.C. attorney admitted that hypothecation questions represented complex matters and that in his experience with the agency he had never seen a case arising under the hypothecation section of the Act.

Bruder, the S.E.C. investigator who had signed the agency's criminal reference report admitted in evidence, confirmed that his report had not listed petitioner as a proposed defendant.

During rebuttal it arose that the government had tried to bring Col. Parlin into Court. However, Parlin was in ill health and could not be moved from his New Jersey home. This motivated the Court to remark:

> "And I will save Mr. Schwartz the trouble of saying, if you would have indicted him in 1962 and tried it in 1962, you wouldn't have had a problem."

Petitioner moved for dismissal at the close of the entire case. During the course of argument on the final motions, the Trial Court indicated areas of doubt and indicated that it had to deal with more than a "simple" statute.[14]

---

[14] As the closing arguments progressed, the Court asked of the prosecutor (at pp. 1247-8):

> "Let's see. The precise point is, is he guilty if his good-faith interpretation of a regulation turns out to be incorrect."

To which the prosecutor replied (at p. 1248):

> "If, for example, the Securities and Exchange Commission told him that this deal is O. K. and go ahead with it, I would say this is one thing.

The Court then asked why should petitioner be guilty if he be-

The Trial Court's decision

The Trial Court found:

> "The government has failed to show beyond a reasonable doubt that defendant Schwartz believed or knew that the transaction with Sterling Factors was a violation of Section 240.8c of the Regulations."

Nevertheless, it concluded that a finding of wilful performance of a proscribed act, however, was not intertwined with a requirement to find a specific intent to transgress a known and applicable Regulation, that while petitioner had not intended to violate a known regulation, he intended to perform the act proscribed thereby. Petitioner was found guilty.

On a motion to set the verdict aside and seeking a new trial, the Court denied the relief sought holding that (a) the jurisdictional requirement under §78h(c) does not rest upon the quantum of business conducted by a broker-dealer through a member of a national exchange, but upon the fact that the broker deals with such firms and (b) that the guilt found of petitioner was in the classic sense of *mens rea*, despite his belief that, after talking to the S.E.C. or otherwise, the transaction did not transgress the regulation. It found that petitioner could be guilty of conspiracy involving §78h(c) and that jurisdictional material was laid before the Grand Jury.

The Court of Appeals for the Second Circuit affirmed the conviction concluding (a) petitioner was not denied his constitutional right to a speedy trial; (b) that §78h(c)

---

lieved that he did not violate the statute, indicating that (at p. 1249):

> "• • • ordinarily, you don't send people to prison for doing what they think is right."

was not unconstitutionally vague; (c) that the government proved hypothecation of stock beyond a reasonable doubt; (d) that the statute does not require a finding of specific intent to support the conviction at bar; (e) that the indictment was not constitutionally insufficient; and that (f) there was no prejudicial error in the admission of Armstrong's records.

REASONS FOR GRANTING THE WRIT

1.

The decision below deprived petitioner of his constitutional right to a speedy trial by having condoned excessive and unexplained pre-accusation and post-indictment delay, all of which operated to petitioner's prejudice. This matter presents a novel situation in that it grants an opportunity for this Court to clarify its prior opinions and to establish rules and guidelines under a fact pattern never so precisely presented to this Court on the occasions of such prior opinions.

Petitioner claimed in the District Court and on appeal below that his constitutional right to a speedy trial was denied to him by both pre-accusation and post-indictment delay, none of which was contributed to by him, and which operated to his actual prejudice.

The Court of Appeals, alluding to *United States* v. *Marion*, 404 U.S. 307 (1971), indicated that the statute of limitations was a complete safeguard to claims of pre-accusation prejudice and that petitioner waived his right to claim post-indictment delay, citing *Barker* v. *Wingo*, 40 U.S.L.W. 4840 (U.S., June 22, 1972).

In an interesting aside, however, the appellate court noted that "(t)he Court in *Marion* set forth no guidelines

for making the 'delicate judgment,' 404 U.S. at 325, as to when actual prejudice alone warranted the dismissal of an indictment for pre-accusation delay."

Pre-accusation delay

The appellate court glosses over the fact that this indictment was handed down on the last day prior to expiration of a five year statute of limitations. In the interim, petitioner, as an attorney, was permitted to represent Armstrong & Co. and individuals before an investigating body of the Securities and Exchange Commission, *only after first having obtained a clearance that he was not involved, personally, in any of the matters being investigated.* A result of the investigation was the barring of Armstrong & Co., Inc. from continuing to do a securities business. That investigation was completed at least two to four years prior to the petitioner's indictment.

A consequence of the result of the investigation led to petitioner's destruction of some 50 to 60 files dealing with his former client, among the files being material dealing with the transaction underlying the indictment. He had no way of knowing that he might be a target for prosecution.

It was brought out on petitioner's case below that the loss of his files caused him to lose notes of his conversation with Col. Parlin, on the legalities of the loan from Sterling. He also indicated that he had to take the word of the government's witnesses to jar his hazy recollection concerning his defense.

Post-indictment delay

The government never explained the reason for the delay in prosecuting the action. The appellate court supposed that the prosecutor busied himself on 17 counts involving

all the defendants and that the government proceeded on count 18 only after it succeeded in disposing of the first 17 counts as against the defendants other than petitioner. The record does not support that surmise, however. On the appeal, the true reason was laid before the appellate court. On January 7, 1971, the *New York Post*, reported of the case against petitioner:

> "Since joining this case last May in his first criminal trial after passing the bar a few months before, Schlam (the prosecuting assistant), 26, said he had accumulated a 'file drawer' full of documents. In order to push the case, *which he said was 'dormant' when he arrived*, Schlam worked 'every day for three months on it, probably because I was stupid.'" [Emphasis supplied.]

The pre-accusation prejudice, through the loss of his files, continued to prejudice petitioner, and the passage of four more years had its toll upon the already aged and blind Col. Parlin.

The appellate court callously remarked that petitioner "should have preserved the files for the benefit of his client, Armstrong". However, at the time of the destruction of the files, Armstrong was, *de facto*, dead as an entity.

The court below declared that petitioner had waived his right to complain of the trial's delay.

In his concurring opinion in *Dickey* v. *Florida*, 398 U.S. 30 (1969), Brennan, J., noted (at pp. 46-47) that a legislatively variable statute of limitations might not satisfy the minimum right of an accused to a speedy trial. He commented upon a balancing of equities to determine the matter of a constitutional waiver of that right [13] and con-

---

[13] "• • • It is possible that the implication of waiver from silence or inaction misallocates the burden of ensuring a speedy trial. *The accused has no duty to bring on his trial.* He is presumed

cluded (at p. 55) that "prejudice (occasioned by delay) must be assumed, or constitutional rights will be denied without remedy."

In *United States* v. *Marion*, 404 U.S. 307 (1971), Justices Douglas, Brennan and Marshall joined together in a concurring opinion, citing English authorities, noted the "monstrous" effect of pre-trial delays upon a defendant. They described pre-indictment delays (at p. 331) which bolstered their admonition that "(u)ndue delay may be as offensive to the right to a speedy trial before as after an indictment or information." They found particularly appropriate the warning of Wright, J., in *Nickens* v. *United States*, 116 U.S. App. D.C. 338, 343, 323 F.2d 808, 813 (1963). They advised that delay "depends upon circumstances."

That court, however, set forth no "guidelines" for the "delicate judgment", found lacking by the Court below. Perhaps, the presence of such mileposts might have operated to favor the petitioner.

In *Barker* v. *Wingo, supra*, the court commented upon the "demand-waiver" doctrine, found to exist in the Second Circuit, and noted that "(t)he Second Circuit's approach is unclear"; that its position was a sort of fence-straddling. It reiterated that "a waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights" and recommended to courts that they "indulge every reasonable presumption against waiver." It suggested that the conduct of *both* the prosecution and defendant be weighed. A guide to the

---

innocent until proved guilty; arguably, he should be *presumed* to wish to exercise his right to be tried quickly, unless he affirmatively accepts delay. The government, on the other hand, would seem to have a responsibility to get on with the prosecution, both out of fairness to the accused and to protect the community interests in a speedy trial. * * *" (398 U.S. at p. 50.) [Emphasis supplied.]

determination suggested, (a) consideration of length of the delay; (b) consideration of the reason the *government* assigns for the delay, with varying weight being assigned to the degree of deliberateness thereof; (c) consideration of the defendant's responsibility to assert his right; and (d) consideration of prejudice. This court specified, however:

> "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. * * *"

There was no suggestion below of the cause for the delay. The government stood mute before both the trial and the appellate court. That silence should demonstrate either deliberate delay or an attitude of complete recklessness. The indictment was handed up years after the government knew of the S.E.C.'s recommendations and long after petitioner believed himself to be free from any accusation.[16] There was a trial delay of more than four years following indictment and more than nine months after petitioner moved for dismissal by reason of the delay. Petitioner suggested and demonstrated his prejudice.

The Second Circuit disregarded the claim of prejudice, blamed petitioner for delay between his motion and the actual trial date,[17] passed over the government's mute

---

[16] Up to the time of his indictment, petitioner was permitted to represent clients before the S.E.C., without any restriction in his movements.

[17] The appellate court found that a substantial part of the 9 month period between petitioner's motion and the trial was taken up with the trial court's consideration of a motion to dismiss count 18. It completely disregarded the fact that an *identical* motion had been made some two years earlier. Moreover, the record fails to indicate that the action would have gone to trial any sooner had the motion addressed to the indictment not have been made.

In the light of its own 6 month demand-waiver rule (which went

presence and sought guidelines for determination of pre-accusation prejudice.

The three cited opinions of this Court dealt with situations not as "contaminated" as the matter at bar. In the *Dickey* and *Marion* cases, suggestions in abstract could be given; however, the facts of each case did not demonstrate the specific evil sought to be suppressed. In *Barker*, some guidelines have been suggested; however, that case did not deal with pre-accusation delay and claims of prejudice as at bar.

The facts of this matter present a case which will enable this Court to answer, directly, those questions left open in the three cited cases. It furnishes a vehicle for the guidelines missing from *Marion*. It furnishes a basis for weighing the interrelationship between the four suggested factors and a determination of constitutional deprivation of the right to a speedy trial. For the first time, it permits this Court to rule directly upon the effect of governmental silence in the face of clear evidence that inordinate delay is present.

---

into effect on June 5, 1971), it appears incongruous that the Court should comment that a 9 month delay between demand and the commencement of the trial "is not of sixth amendment proportions". (Slip opinion, p. 4165.)

2.

A novel situation is presented to this Court in the presence of the trial Court's decision below, that the grand jury indictment of petitioner was not supported by evidence "sufficient" by any standard. The Court is presented with the opportunity of clarifying its prior opinions in *Costello* v. *United States* (350 U.S. 359) and *Lawn* v. *United States* (355 U.S. 339) in which there was some form of evidence presented to support the indictment.

The record reveals that petitioner made two separate motions seeking the dismissal of Count 18 on the basis of the insufficiency of the indictment. In each instance, petitioner argued that the material laid before the Grand Jury was insufficient to support the indictment. The first motion was denied outright, in 1968. On the second motion, decided two years later, the District Court Judge wrote:

> "The precise language of Mr. Justice Black in *Costello* v. *United States,* 350 U.S. 359 at 363 makes the bare vote of the Grand Jury enough. *Here there was that and nothing more. There was no evidence 'sufficient' by any standard to support the charge.* Nevertheless, the motion must be denied. It is so ordered." [Emphasis supplied.]

Referring to its own opinion in *United States* v. *Arcuri,* 405 F.2d 691 (1968), *cert. denied,* 395 U.S. 913 (1969), the Second Circuit restated that a motion to dismiss an indictment because of the absence or incompetency of evidence before the Grand Jury is addressed to the discretion of the trial court and that such discretion will not be disturbed unless abused. On its own investigation, the Circuit Court found "some competent evidence" to support the indict-

ment and held that the trial court did not abuse its discretion in having denied petitioner's motion. *However, the trial court found "no evidence 'sufficient' by any standard to support the charge."* The appellate court, thus, undertook to interfere with a discretionary finding which it affirmatively declared not to have been a product of abuse.[11]

In *United States* v. *Farrington*, 5 F. 343 (D.C., S.D.N.Y. 1881), the court succinctly stated:

> "• • • It is not the province of the court to sit in review of the investigations of a grand jury as upon the review of a trial when error is alleged; *but in extreme cases, when the court can see that the finding of a grand jury is based upon such utterly insufficient evidence, or such palpably incompetent evidence,* as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused, *the court should interfere and quash the indictment.*" [Emphasis supplied.]

In a concurring opinion in *Costello* v. *United States*, 350 U.S. at 364, Mr. Justice Burton wrote:

> "• • • it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, the indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen."

---

[11] The documents referred to at page 4177 of the slip opinion as having been presented to the Grand Jury were insufficient to constitute *evidence* sufficient by any standard to support the charge and the trial judge so declared.

The "empty" indictment finds no solace from holdings of this court in *Costello* (where hearsay evidence was sufficient to support the indictment) or in *Lawn* v. *United States*, 355 U.S. 339 (1958) (where illegally seized evidence supported the indictment).

In *Hale* v. *Henkel*, 201 U.S. 43 at 59, this court said:

> "• • • the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will."

The grand jury traditionally stands as a safeguard against arbitrary action.[19] It is designed as a means "not only of bringing to trial persons accused of public offenses upon *just* grounds, but also as a means of protecting the citizen against *unfounded accusation*."[20]

There can be no mistaking the decision of the trial judge. Had he not been bound by the *Costello* decision, he might have ruled otherwise.

In *Costello* and the cases following in which this Court was called upon to inspect allegedly insufficient indictments, there was some form of evidence found to be "sufficient" to support the same. This Court has not been called upon to examine a case where the trial judge affirmatively declared an indictment to have been found only upon a bare vote of the grand jury without evidence sufficient by any standard to support the charge.

---

[19] *United States* v. *Wells*, 163 F. 313, 314 (1908).

[20] *Ex parte Bain*, 121 U.S. 1, 11 (1886).

It is submitted that the matter at bar presents precisely that constitutional abuse described by Mr. Justice Burton in his concurring opinion in *Costello*.

The Court is now presented with a situation where, irrespective of *Costello* and its later decisions, it can clearly state the function of the grand jury as a body designed to protect rights guaranteed by the Fifth Amendment.

3.

The provisions of 15 U.S.C. §78h(c) have never been presented to this Court for a determination of its constitutionality. The statute is vague and devoid of sufficient safeguards to satisfy the requirements of the due process clause of the Fifth Amendment. Additionally, the construction adopted below may open the door to a species of regulation never intended to affect over-the-counter securities brokers.

Title 15 U.S.C., §78h(c), under which petitioner was convicted, has never been construed by this Court. The trial judge found that petitioner, an attorney extremely capable in handling matters before the Securities and Exchange Commission, neither believed nor knew that the transaction underlying the indictment was a violation of the statute and of the rules promulgated thereunder. Petitioner argued that the statute was unconstitutional by reason of vagueness.

The statute opens with a preamble, providing:

> "It shall be unlawful for * * * any broker or dealer who *transacts a business* in securities through the medium of any such member [of a national securities exchange] directly or indirectly—" [Emphasis supplied.]

It was argued below that the phrase "transacts a business" has a particular meaning to one expert in the field, as was petitioner. He referred to the construction given to the Federal Reserve Board's Regulation T,[21] which advised:

> "• • • 'transacts a business in securities through the medium of a member must turn upon all the relevant facts involved in the business of that broker or dealer • • •."

The Federal Reserve Board dealt specifically with the problem of whether a broker or dealer who transacted approximately 10 percent of its total business fell within the statute's purview. It opined:

> "• • • It seems clear that a firm could be transacting 'a business' in securities through the medium of a member even though such business constituted no more than 10 per cent of the total securities business of the firm."

Up to the time of the indictment, there had been no other construction of the aforesaid preamble. The trial court found that Armstrong's business in listed securities through members of a National Securities Exchange had been less than 1% of the total securities business of the firm. Petitioner testified that he did not believe §78h(c) to have been applicable to the transaction under which he stood indicted. He argued that the Securities and Exchange Commission agreed with his view (a) through the informal opinion rendered to him by Col. Parlin (b) which was confirmed in the Investigation Report of the Commission which omitted his name as a proposed defendant and which made no

---

[21] 25 *Federal Reserve Bulletin*, 961 (1939).

reference to any hypothecation violation under §78h(c) in connection with the Triangle stock issue.

Petitioner argued that in framing §78h(c) the Congress could have chosen the term "transacted business" as the same was employed by it in §78o [in whose language the indictment is actually drawn] had it intended its enactment to embrace brokers and dealers whose business through members of national securities exchanges were minimal. The Circuit Court found that "Congress intended §8(c) [of the Act] to apply to any broker or dealer, who transacted more than a trivial or *de minimus* business in securities through the medium of members of national securities exchanges." Can it be said, however, that *less* than 1% of a total securities business would constitute more than a trivial or *de minimus* business? Moreover, can it be said that the choice of language of §78h(c), in the light of the language of §78o and of the construction of the Federal Reserve Board, *supra*, conveyed sufficiently definite warning as to who would be embraced within the proscribed conduct?

Petitioner contended below that the statute failed to specify sufficient details for satisfaction of the mandates of the due process clause.[22]

It would appear that when one, an expert in the securities field, must strain himself to interpret a fact situation left undefined by a penal statute, in order to speculate whether or not there is a possibility of a violation thereof, such statute must be found to be vague and an insufficient warning to men of *common* intelligence. (Cf. *Jordan* v. *DeGeorge*, 341 U.S. 223, 231-232 (1951).)

---

[22] *Kraus & Bros.* v. *United States*, 327 U.S. 614, 617 (1946); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939); *United States* v. *Cardiff*, 344 U.S. 174, 176 (1952); *Musser* v. *Utah*, 333 U.S. 95, 97 (1948); *Connally* v. *General Const. Co.*, 269 U.S. 385, 391 (1926).

It was conceded by the government below that there has never before been a prosecution under §78h(c) and that this is a case of first impression. The novel construction adopted below, now on the books, may well open the door to the prosecution of situations never before construed by the Securities and Exchange Commission as constituting a violation of the hypothecation section of the Act. The "expert" authorities appear to be in agreement with petitioner's position; however, the Courts have determined otherwise and genuine conflict exists in that area.

4.

The provisions of 15 U.S.C. §78ff(a) have never been presented to this Court for a determination of its constitutionality. The statute is vague and misleading concerning the requirements of "intent" necessary to the definition of a violation thereunder. The decisions below inject confusion into the penalty statute governing violations of statutes, rules and regulations affecting matters within the jurisdiction of the Securities and Exchange Commission and affect significant and recurring problems in the securities field.

It appears that the penalties provisions of 15 U.S.C., §78ff(a) have never been before this Court. The statute provides, *inter alia:*

> "Any person who *wilfully* violates any provision of this chapter, or any rule or regulation * * * the observance of which is required under the terms of this chapter * * * shall upon conviction be fined * * * or imprisoned * * *; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation." [Emphasis supplied.]

The trial and appellate courts below found that *mens rea* —a specific criminal intent to violate the statute and regulation—was not a necessary element of the crime. Both courts pointed to the final clause of the statute to hold that even one without knowledge of a rule or regulation might be convicted thereunder. Both courts disregarded the indictment which charged that petitioner "wilfully *and knowingly*" committed a crime.

It is submitted that the statute is unconstitutionally vague. Had the Congress intended that all violations embraced by §78ff(a) be *mala prohibita*, then, the word "wilfully" would be superfluous. However, can the word be so carelessly tossed aside?

"Wilfully" has a definite meaning in the law. A *wilful* offender has been said to be one possessing a criminal intent.[33] An act done "wilfully" is one purposefully done and with bad purpose either to disobey or to disregard the law.[34] It is wilful where one knowing the requirements of law *deliberately* refrains from complying therewith.[35] The trial court found petitioner to have been without any evil motive and that the government failed to prove that petitioner knew or believed that the loan transaction transgressed the Regulations.

Perhaps, as an afterthought, the district court found petitioner "criminally culpable", holding that he had knowledge of the [transgressed] rule.[36] That finding, specifically affirmed below, contradicts the trial court's conclusion, both

---

[33] *United States* v. *Murdock*, 290 U.S. 389, 396 (1933).

[34] *United States* v. *Krosky*, 418 F.2d 65, 67 (6th Cir., 1969).

[35] *United States* v. *Couming*, 445 F.2d 555, 557 (1st Cir., 1971).

[36] Ruling on Motion for Judgment of Acquittal and for a New Trial, at 8 (May 14, 1971).

during the course of the trial and in its final opinion that petitioner neither believed nor knew that the transaction with Sterling ran afoul of the Regulations. Such confusion is compounded even more by the Circuit Court's footnote reference[17] to *United States* v. *Lilley*, 291 F. Supp. 989, 993 (S.D. Tex., 1968), where it was said:

> "* * * Proof of no knowledge cannot mean proof that defendants did not know, for example, the precise number or common name of the rule, the book and page where it was to be found, or the date upon which it was promulgated. It does not even mean proof of a lack of knowledge that their conduct was proscribed by the rule rather than by statute. Proof of 'no knowledge' of the rule can only mean proof of an ignorance of the substance of the rule, that they did not know *that their conduct was contrary to law.*" [Emphasis supplied.]

The trial court found that petitioner neither knew nor did he believe that his conduct was contrary to law. If such be the finding, and the Circuit Court did not find otherwise, then one must wonder how an innocent can be found "criminally culpable" upon the expressed language of the trial judge.

The confusion of the courts below demonstrates the absence of constitutionally required guidelines for the common man. The statute appears to demand both specific intent and lack of specific intent. The treatment of the problem below and the uncertainty generated thereby invites this Court's intervention to settle the issue.

---

[17] Opinion slip, p. 4172.

5.

A fair trial was denied to petitioner by reason of multiple prejudicial errors below occasioned when the trial court (1) misapplied statutory rules of construction to the facts, (2) shifted the burden of proof in a criminal prosecution to the defendant and (3) admitted tainted evidence and incomplete business records which operated to create an hostile atmosphere toward petitioner, all in deprivation of his right to due process of law under the Fifth Amendment.

(1)

Substantial justice was denied below by petitioner's conviction without proof, beyond a reasonable doubt, that a proscribed hypothecation of securities was accomplished through petitioner's conspiracy.

The uncontroverted proof demonstrated that Armstrong delivered executed stock powers, assigning its *rights* to receive the Triangle shares, *if and when the shares were issued*, to Sterling *one day prior to the actual issuance of those shares.*

Both §78h(c) and 17 C.F.R. §240.8c-1 proscribe hypothecation of "securities carried for the account of any customer." The appellate court found that the proof demonstrated that the hypothecated shares had been "(s)ecurities received by or on behalf of such member, broker or dealer for the account of any customer".[18] That court rested its affirmance upon a *pre-trial* opinion of the trial court that if the broker were able to pledge the securities, then, the broker must have received the same within the purview of the Rule.[19] The fallacy of that conclusion lies in its

---

[18] 17 C.F.R. §240.8c-1(b)(2)(i).

[19] Opinion slip, pp. 4170-4172.

timing. The ruling antedated the trial, and preceded the trial evidence which demonstrated that it was the *right* to receive securities and not the securities themselves which was hypothecated. The plain fact is that Armstrong had not received any securities at the time of the alleged hypothecation."

The only authority cited by the trial court[31] failed to support its conclusion, since the court therein recognized that an hypothecation of a right to receive liberty bonds prior to the issuance thereof failed to constitute a violation of the New York anti-hypothecation statute.

The proof below failed to satisfy any of the requirements under the definition of the term, "securities carried for the account of any customer."

At the close of the government's case, the trial court expressed doubt and ruled:

> "The defendant does not have to prove an affirmative defense by any measurable standard of testimony, but in these circumstances, it appears to me that the defendant *must* present evidence which, taken with all other evidence in the case, would put the trier of the facts in a position to determine *whether or not the government has shown beyond a reasonable doubt the presence of such wilful and knowing conduct as to contemplate a finding of violation.*" [Emphasis supplied.]

Actually, the trial court shifted the burden of proof to defendant in violation of his rights.[32] Moreover, the government never demonstrated that petitioner "knew" that

---

[31] See, Green, *The Rules Governing the Hypothecation of Customers' Securities and Manipulation of Security Prices, in the Over-The-Counter Market*, at p. 7 (delivered as an address on January 21, 1941).

[31] *People* v. *Atwater*, 229 N.Y. 303 (1920).

[32] *Davis* v. *United States*, 160 U.S. 469, 487 (1895).

the Sterling loan transaction constituted an hypothecation of securities carried for the account of a customer of Armstrong.[13] The crime charged by the indictment was that petitioner "wilfully and *knowingly*" committed the same. There was a complete absence of "knowledge" on the part of petitioner; thus, his guilt was not supported beyond a reasonable doubt.

(2)

The trial court admitted blotters and ledgers of Armstrong in evidence, under the Federal Business Records Act, 28 U.S.C. §1732. Although admittedly impeached for accuracy, the appellate court held the trial court to have found that the records "had been made in the regular course of Armstrong's business and that it was the regular course of business of Armstrong to keep such records".[14] Additionally, it found that petitioner had not pointed to any specific instance where the district court relied upon an unclear entry to his prejudice.

Actually, the inflammatory atmosphere created at the trial, through the admission of Armstrong's records, operated to petitioner's prejudice. While the trial court did not find petitioner to have been more than Armstrong's legal advisor, the appellate court held him to have been "intimately involved in its business" beyond the scope of a mere lawyer.[15]

Armstrong was not the defendant on trial. Edens having already entered a plea, he, too, was no longer a defendant. There can be no denial that Armstrong committed all sorts of violations (and crimes) in the methods of its record

---

[13] *Christoffel* v. *United States*, 338 U.S. 84, 89 (1949).

[14] Opinion slip, p. 4177.

[15] Opinion slip, p. 4157.

keeping; however, none of those faults could be or were attributed to petitioner. Under the framework of the indictment, one must ponder just why the government and the court permitted about half of the trial to be devoted to the introduction of such faulty records.

The bizarre conclusion is that the government sought to depict petitioner as one associated with unsavory actors; thereby, petitioner was charged with the guilt of his associates. The government's success in such regard is found in the Second Circuit's opinion which held some of Armstrong's taint to have rubbed off on petitioner.

Had Armstrong been on trial, then, its records would have demonstrated the manner in which it maintained its books. However, no one can seriously contend that such records were any indication of Armstrong's actual business or that the manner of its bookkeeping had anything to do with petitioner. Armstrong did precisely what it wanted to do and it manipulated its books to show whatever it desired to disclose. The records were neither "reliable" nor "trustworthy" [11] and such infirmities were succinctly demonstrated to the courts below.

While individual instances of prejudice cannot be isolated, as required by the Circuit Court, it is submitted that the over-all atmosphere of the prosecution, contaminated by the admission of the faulty, imperfect and unnecessary records, created a cloud of hostility which petitioner could not avoid. It was as though petitioner's guilt had been predetermined and that his protestations of innocence were to go ignored.

Under such circumstances, petitioner could not be fairly tried and his rights to due process of law under the Fifth Amendment were denied to him.

---

[11] *Palmer* v. *Hoffman*, 318 U.S. 109, 112-113 (1943).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

ARNOLD DAVIS
Counsel for Petitioner
40 Exchange Place
New York, New York 10005

August 31, 1972